

May 9, 2008

SDEC Informal Advice Letter No. IA08-04

Councilmember Toni Atkins  
City Council District 3  
202 "C" St., 10th Floor  
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification from Municipal Decisions  
Involving the Housing Commission

Dear Councilmember Atkins:

This advice letter responds to your e-mail to the City of San Diego Ethics Commission dated April 28, 2008. You seek advice from the Ethics Commission concerning disqualification provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Specifically, you ask whether you may participate as a member of the Housing Authority with respect to upcoming municipal decisions involving the Housing Commission in light of the fact that you have submitted your resume for the position of President and Chief Executive Officer with that entity. Because you have not identified any specific municipal decisions, we are treating your inquiry as a request for informal advice.

### **QUESTION**

Does your application for employment with the Housing Commission create a conflict of interest that disqualifies you from participating in upcoming municipal decisions involving the Housing Commission?

### **SHORT ANSWER**

The City's Ethics Ordinance provides that a City Official is prohibited from participating in a municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on his or her economic interests. You have an economic interest in your own personal finances, which would clearly be impacted by paid employment with the Housing Commission. Accordingly, you may not participate in any Housing Authority decisions pertaining to the appointment or hiring of the President and Chief Executive Officer of the Housing Commission. You may, however, participate in other Housing Authority decisions affecting the Housing Commission that do not involve your prospective employment.<sup>1</sup>

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<sup>1</sup> Although your April 28, 2008, e-mail focuses on decisions you may make in your capacity as a member of the Housing Authority, the conclusions reached in this letter will also apply to any decisions you make as a member of the City Council.

You should also be aware that if the Housing Commission offers you employment, from that point on you will be disqualified from participating in your capacity as a member of the Housing Authority in municipal decisions that involve the Housing Commission.

## **BACKGROUND**

According to your April 28, 2008, e-mail, you have submitted your resume to the Housing Commission for the open position of President and Chief Executive Officer. The Housing Commission is a public agency created by the San Diego City Council in 1979 to assist low-income families, seniors, and people with disabilities obtain affordable housing in the City. The Housing Commission reports to the San Diego Housing Authority, which is composed of the members of the San Diego City Council. Accordingly, as a member of the Housing Authority, you regularly vote on issues directly related to the Housing Commission, including the Commission's annual budget and its long-range plan. You are now seeking advice regarding whether you may lawfully participate as a member of the Housing Authority in upcoming municipal decisions involving the Housing Commission.

## **DISQUALIFICATION ANALYSIS**

### *A. Municipal Decisions Affecting Economic Interests*

SDMC section 27.3561 prohibits you, as a City Official, from knowingly influencing a "municipal decision" if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of your economic interests. The Ethics Ordinance states that you are considered a "City Official" while you are acting in your capacity as an officer of the Housing Authority. SDMC § 27.3503. The term "municipal decision" includes any decision made by the Housing Authority. Thus, when you are serving as a member of the Housing Authority and participating in decisions regarding the Housing Commission, you are participating in a "municipal decision" under the Ethics Ordinance.

The Ethics Ordinance identifies economic interests that may lead to disqualification: business interests; business positions; real property interests; sources of income; sources of gifts; and personal finances. SDMC § 27.3561. These provisions are based on the state law contained in the Political Reform Act (Cal. Gov't Code §§ 81000-91014).<sup>2</sup> Nothing in the e-mail you sent us suggests that any of the first five economic interests are applicable to the Housing Commission. In other words, the Housing Commission is not a business entity in which you have a financial interest or business position; it is not a piece of real property in which you have an ownership or leasehold interest; and it has not been a source of income or gifts to you during the previous twelve months.<sup>3</sup>

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<sup>2</sup> Applicable definitions and provisions from the Political Reform Act and the related regulations adopted by the California Fair Political Practices Commission [FPPC] expressly apply to the City's Ethics Ordinance. SDMC § 27.3503. We therefore turn to interpretations of state law from time to time for guidance in interpreting the City's Ethics Ordinance.

<sup>3</sup> Although the Housing Commission may become a source of income to you in the future, salary from a public agency is exempt from the City's disqualification provisions. SDMC § 27.3561(c); Cal. Gov't code § 82030(b)(2).

Because you have applied for employment with the Housing Commission (by submitting your resume), the sixth category of economic interests (your personal expenses, income, assets, and liabilities) is relevant to decisions involving that agency. According to the “personal financial effects” rule, if your expenses, income, assets, or liabilities are substantially likely to go up or down by \$250 or more in a 12-month period as the result of a municipal decision, then that decision has a “personal financial effect” on you. SDMC § 27.3561(b)(6); FPPC Regulation 18705.5(a). Under the City’s disqualification provisions, therefore, you may not participate in a municipal decision if it is reasonably foreseeable that the decision will impact your personal finances by \$250 or more in a 12-month period. Because you are seeking the position of President and Chief Executive Officer of the Housing Commission, a paid position, it is reasonably foreseeable that decisions involving hiring for that position will impact your personal finances by \$250 or more.

The FPPC Regulation cited above creates, in some cases, an exemption to the “personal financial effect” rule when the income at issue is from a public agency:

The financial effects of a decision which affects only the salary, per diem, or reimbursement for expenses the public official or a member of his or her immediate family receives from a federal, state, or local government agency shall not be deemed material, unless the decision is to appoint, hire, fire, promote, demote, suspend without pay or otherwise take disciplinary action with financial sanction against the official . . . .

FPPC Regulation 18705.5(b) (emphasis added).

Because the above exemption does not apply to appointments and hirings, this exemption clearly will not apply to decisions relating to the appointment or hiring of the Housing Commission’s next President and Chief Executive Officer. Thus, based on the disqualification provisions set forth above, you may not, as a member of the Housing Authority, lawfully participate in any decisions that involve the hiring or appointment of the Commission’s President and Chief Executive Officer.

On the other hand, your interest in employment with the Housing Commission does not disqualify you from participating in other Housing Commission decisions – those that do not involve the hiring or appointment of a President and Chief Executive Officer.

#### *B. Future Employment*

In addition to the disqualification provisions cited above, the City’s Ethics Ordinance contains restrictions relating to a City Official’s ability to participate in City decisions involving prospective employers. SDMC section 27.3551(a) states: “It is unlawful for any City Official to make, participate in making, or use his or her official position to influence a decision involving the interests of a person with whom he or she is seeking, negotiating, or securing an agreement

concerning future employment.” The purpose of these kinds of prohibitions is to ensure that an official does not use his or her position to make decisions that unduly benefit the organization that is hiring the official. *In re Harris*, FPPC Adv. Ltr. I-07-115.

We have historically interpreted section 27.3551 to not apply when the prospective employment is with another public agency. When the Ethics Commission drafted the City’s Ethics Ordinance, it modeled section 27.3551 on similar provisions in state law, namely California Government Code section 87407: “No public official shall make, participate in making, or use his or her official position to influence, any governmental decision directly relating to any person with whom he or she is negotiating, or has any arrangement concerning, prospective employment.” The FPPC has construed this statute to permit a public official to participate in decisions concerning a prospective employer when the prospective employer is a state, local, or federal governmental agency.” FPPC Regulation 18747(d). Although other public agency exemptions were incorporated into the Ethics Ordinance (e.g., post-employment lobbying laws, governmental salary exception for disqualification purposes), it appears that the public agency exception for future employment was inadvertently omitted.

At its meeting on February 10, 2005, the Ethics Commission concluded that it had intended to include the public agency exemption in the original draft of the Ethics Ordinance. It agreed that section 27.3551 should be interpreted as containing the exemption, and that it would eventually propose to the City Council an amendment expressly incorporating the exemption into section 27.3551. In early 2008, the Ethics Commission did propose such an amendment, and on April 15, 2008, the City Council adopted Ordinance O-19737, which added a new subsection (c) to section 27.3551 so that the code section reads as follows:

- (a) It is unlawful for any City Official to make, participate in making, or use his or her official position to influence a decision involving the interests of a person with whom he or she is seeking, negotiating, or securing an agreement concerning future employment.
- (b) It is unlawful for any person who has a matter pending before the City to negotiate, directly or indirectly, knowingly or willfully, the possibility of future employment of a City Official who is making, participating in making, or using his or her official position to influence, a decision concerning that matter.
- (c) The prohibitions set forth in subsections (a) and (b) do not apply to a City Official’s prospective employment with a public agency.

This amendment becomes effective on May 15, 2008.

Based on the Ethics Commission’s historical interpretation, and the City Council’s recent adoption of language codifying that interpretation, it is our position that the future employment prohibitions contained in SDMC section 27.3551 do not apply to your interests in seeking employment with the Housing Commission. In other words, this provision of the Ethics Ordinance does not preclude you from participating as a member of the Housing Authority in decisions that affect the Housing Commission.

The FPPC reached a similar conclusion in *In re Harris*, FPPC Adv. Ltr. I-07-115, when it determined that the state's prospective employment prohibitions (Cal. Gov't Code § 87407) did not apply to a California Department of Education officer who was contemplating an offer of employment from the Sacramento County Office of Education.

Note that this conclusion does not supersede the disqualification analysis discussed above. In other words, it does not grant you permission to participate as a City Official in decisions involving the Housing Commission's hiring or appointment of a President and Chief Executive Officer. With regard to other Housing Commission matters, however, such as the Commission's annual budget and long-range plan, you may participate in those matters in your capacity as a member of the Housing Authority notwithstanding your interest in prospective employment with the Housing Commission.

### *C. Disqualification Based on "Opportunity for Compensation"*

There is an additional provision of the Ethics Ordinance that will become relevant if the Housing Commission offers you employment. Although it is not presently a disqualifying concern, you should be aware of the provisions of SDMC section 27.3562(a), which states: "[i]t is unlawful for any City Official to participate in any municipal decision where a party to the municipal decision has given the City Official, promised to give the City Official, or acted as an intermediary for the City Official to have, an opportunity for compensation."

If the Housing Commission (which is a "party" under SDMC section 27.3503 if it is the subject of a municipal decision) offers you employment, it is essentially offering you an "opportunity for compensation." Although the legislative history behind this code section indicates that its enactment was prompted by opportunities for compensation from private parties, this code section contains no exemption for public agencies.<sup>4</sup> Absent the existence of any legislative intent to the contrary, we must interpret this section to apply to the compensation that would be yours to accept in the event that the Housing Commission extends an offer of employment to you. Thus, if the Housing Commission does decide to offer you the position of President and Chief Executive Officer, you may not thereafter participate as a member of the Housing Authority with regard to any matters in which the Housing Commission is a party.

## **CONCLUSION**

Under the City's Ethics Ordinance and the facts you have provided to us, your interest in an executive position with the Housing Commission does not disqualify you from participating in decisions involving the Housing Commission, with the exception of hiring decisions that involve the position you are seeking. You may, therefore, as a member of the Housing Authority, participate in decisions that involve the Housing Commission so long as those decisions do not involve the hiring or appointment of the Commission's President and Chief Executive Officer.

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<sup>4</sup> Because SDMC section 27.3562 is not derived from any other municipal, state, or federal law, we cannot rely on the interpretations of any other entity for guidance in interpreting its meaning.

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Looking beyond the facts currently at issue, keep in mind that if the Housing Commission does decide to offer you the position, that offer would become an “opportunity for compensation” that would thereafter disqualify you from participating in municipal decisions that involve the Housing Commission as a party.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

Sincerely,

Alison Adema  
General Counsel

By: Stephen Ross  
Program Manager-Technical Assistance